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In the Supreme Court of the United States

OCTOBER TERM, 1979

DALLAS RAY DELAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that he is entitled to reversal of his conviction under the policy of the Department of Justice against successive state and federal prosecutions.

1. On January 17, 1973, petitioner abducted Mr. and Mrs. Bob Reid Ketterman and their 17-year-old daughter (Pet. App. A2). Petitioner strapped an explosive device to the back of Mr. Ketterman and directed him to go to the Bank of Grandin, Missouri, where he served as president. Petitioner told Mr. Ketterman to withdraw funds and to return to the site where Mrs. Ketterman and the daughter were being held hostage (*ibid.*). Mr. Ketterman did as he was directed and returned with $10,850 to the area where petitioner held the two women (*ibid.*). In return for his cooperation, Mr. Ketterman, his wife, and daughter were tied to trees and executed by petitioner (*ibid.*).

Shortly thereafter, petitioner pleaded guilty in Missouri state court to three counts of murder and was sentenced to three consecutive life terms. In January 1974, following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of bank robbery (Count I), in violation of 18 U.S.C. 2113(a), and three counts of killing in an attempt to avoid apprehension for that robbery (Counts II, III, IV), in violation of 18 U.S.C. 2113(e). Petitioner was sentenced to consecutive terms of 20 years' imprisonment on the bank robbery count and 100 years' imprisonment on each of the remaining counts. On appeal, the judgments of conviction were affirmed, but the court vacated the sentences imposed under the first three counts of the indictment (Pet. App. A2). *United States* v. *Delay*, 500 F. 2d 1360 (8th Cir. 1974). Petitioner did not seek certiorari.

Four years later, on July 31, 1978, petitioner filed a motion to vacate his sentence on the remaining count pursuant to 28 U.S.C. 2255 on the ground that the prosecution violated the Department of Justice policy against successive prosecutions of several offenses arising out of the same transaction unless there are compelling reasons and the specific authorization of the Assistant Attorney General has been obtained (Pet 3). See *Petite* v. *United States*, 361 U.S. 529 (1960); *Rinaldi* v. *United States*, 434 U.S. 22, 28-29 (1977). Petitioner also argued that his federal prosecution violated the Double Jeopardy Clause (Pet. App. A3). His motion was dismissed by the district court, and the court of appeals affirmed (Pet. App. A1-A11).

2. The court of appeals correctly held that petitioner's federal conviction is constitutionally valid, "since few matters are more firmly established than that the fifth

amendment does not prohibit prosecution by both federal and state officials for crimes against each sovereign involving the same acts" (Pet. App. A3). See *United States* v. *Wheeler*, 435 U.S. 313, 316-318 (1978); *Abbate* v. *United States*, 359 U.S. 187, 195 (1959). And, although petitioner's federal prosecution was not approved by an Assistant Attorney General, as required by the *Petite* policy, see *Rinaldi* v. *United States*, *supra*, 434 U.S. at 28-29, we do not believe it is appropriate to apply this policy in a proceeding involving only a collateral attack upon a legally valid judgment that has already become final.[1] Indeed, although 28 U.S.C. 2106 confers on appellate courts the power to assist the government in implementing its *Petite* policy in connection with direct review of a conviction, we doubt the similar power exists in the case of a collateral attack.

This determination fully comports with the judicially recognized limitations on the scope of 28 U.S.C. 2255 relief. Not every claim of error can be raised on a Section 2255 motion. *United States* v. *Timmreck*, No. 78-744 (May 21, 1979). Rather, the grounds on which relief may be granted under Section 2255 are similar to those encompassed by the general federal habeas corpus statute. 28 U.S.C. 2254. See *Stone* v. *Powell*, 428 U.S. 465, 479 (1976); *Davis* v. *United States*, 417 U.S. 333, 343-344 (1974); *Hill* v. *United States*, 368 U.S. 424, 427 (1962). Hence, as asserted error is cognizable on collateral attack only if it is a "fundamental defect which

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[1]While we have previously sought dismissal of the indictment in cases on direct appeal where the *Petite* policy had been contravened see, *e.g.*, *Rinaldi* v. *United States*, *supra*; *Frakes* v. *United States*, 435 U.S. 911 (1978); *Ackerson* v. *United States*, 419 U.S. 1099 (1975)—we are aware of no case in which such action has been taken after the judgment of conviction has become final.

inherently results in a complete miscarriage of justice" or "present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Davis* v. *United States*, *supra*, 417 U.S. at 346, quoting from *Hill* v. *United States*, *supra*, 368 U.S. at 428 (emphasis in original). See *Stone* v. *Powell*, *supra*, 428 U.S. at 477 n.10; *United States* v. *Timmreck*, *supra*, slip op. 4. The *Petite* policy confers no enforceable rights upon a defendant in a criminal case; it is a simply internal departmental rule governing the exercise of prosecutorial discretion, a matter that is both highly discretionary and ordinarily not subject to judicial review. See *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *United States* v. *Wallace*, 578 F. 2d 735, 740 (8th Cir. 1978). Consequently, it does not present an appropriate ground for vacating a conviction on collateral attack.

3. Petitioner suggests (Pet. 7-12) that this Court should grant certiorari to determine the question whether the application of the *Petite* policy by the Department in a particular case is subject to judicial review at the behest of the accused.

It has been recognized, however, that the policy involves the exercise of prosecutorial discretion in determining whether "to initiate, or to withhold, prosecution for federal crimes" (*Rinaldi* v. *United States*, *supra*, 434 U.S. at 27), and it is established that the policy does not confer enforceable rights on criminal defendants. See Pet. App. A6-A10; *United States* v. *Wedelstedt*, 589 F. 2d 339 (8th Cir. 1978); *United States* v. *Thompson*, 579 F. 2d 1184 (10th Cir.) (en banc), cert. denied, 439 U.S. 896 (1978); *United States* v. *Hutul*, 416 F. 2d 607 (7th Cir. 1969); see also *Sullivan* v. *United States*, 348 U.S. 170 (1954). Since there is no conflict among the circuits on this issue even in the context of

direct appeals, there is no reason for review by this Court.

Petitioner's reliance on *Rinaldi* v. *United States*, *supra*, is misplaced. In *Rinaldi* this Court held that "[t]he defendant, therefore, should receive the benefit of the policy *whenever its application is urged by the Government*" (434 U.S. at 31) (emphasis added). It did not suggest that the defendant could himself obtain its application. Indeed, no appellate court has ever reversed a criminal conviction over the Department's objections on the ground of failure to follow the *Petite* policy.

Petitioner also relies on the decisions in *United States* v. *Heffner*, 420 F. 2d 809 (4th Cir. 1969), and *United States* v. *Leahey*, 434 F. 2d 7 (1st Cir. 1970), which found that statements to Internal Revenue Service agents should be suppressed because the agents had violated IRS regulations requiring *Miranda*-type warnings prior to conducting non-custodial interviews of tax fraud suspects. But the continuing validity of those decisions is doubtful at best in light of *United States* v. *Caceres*, 440 U.S. 741 (1979), holding that evidence obtained in violation of IRS procedures pertaining to authorization of electronic surveillance may not be excluded on that ground. In any event, the *Petite* policy, as we have noted above, is an internal Justice Department rule governing the exercise of prosecutorial discertion, which, unlike the question of admissibility of evidence considered in *Leahey* and *Heffner*, is ordinarily not subject to judicial

review. See *Bordenkircher* v. *Hayes*, *supra*; *Sullivan* v. *United States*, *supra*.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979

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[2]Moreover, the justification for suppression in *Leahey* and *Heffner* was not merely that the agency had violated its own regulations, but that due process was implicated because the taxpayer may have reasonably relied on the regulation in making post-offense statements to his detriment. See also *United States* v. *Caceres*, *supra*; *Raley* v. *Ohio*, 360 U.S. 423, 437-438 (1959). This rationale is inapplicable here, since, as the court stated in *Leahey*, supra, 434 F. 2d at 11, "[n]o one has the right to commit a crime, even if misled by the government as to its enforcement methods."

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